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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

11 ALBERT DYTCH,) No.
12 Plaintiff,)
13 vs.)
14 BRAZIL CAFE BERKELEY, LLC dba) COMPLAINT ASSERTING DENIAL OF
15 BRAZIL CAFE @ WESTBRAE) RIGHT OF ACCESS UNDER THE
16 BIERGARTEN; LYNN MARIE FERREIRA) AMERICANS WITH DISABILITIES ACT
17 dba BRAZIL CAFE @ WESTBRAE) FOR INJUNCTIVE RELIEF,
18 BIERGARTEN; CARL ANTHONY) DECLARATORY RELIEF, DAMAGES,
19 LASAGNA dba BRAZIL CAFE @) ATTORNEYS' FEES AND COSTS (ADA)
20 WESTBRAE BIERGARTEN; PEDRO)
21 PAULO ROBIN dba BRAZIL CAFE @)
WESTBRAE BIERGARTEN; WESTBRAE)
PROPERTIES LLC;)
Defendants.)

I. SUMMARY

1. This is a civil rights action by plaintiff ALBERT DYTCH ("Plaintiff") for discrimination at the building, structure, facility, complex, property, land, development, and/or surrounding business complex known as:

Brazil Cafe @ Westbrae Biergarten
1280 Gilman Street
Berkeley, California 94706
(hereafter "the Facility")

1 2. Plaintiff seeks damages, injunctive and declaratory relief, attorney fees and
2 costs, against BRAZIL CAFE BERKELEY, LLC dba BRAZIL CAFE @ WESTBRAE
3 BIERGARTEN; LYNN MARIE FERREIRA dba BRAZIL CAFE @ WESTBRAE
4 BIERGARTEN; CARL ANTHONY LASAGNA dba BRAZIL CAFE @ WESTBRAE
5 BIERGARTEN; PEDRO PAULO ROBIN dba BRAZIL CAFE @ WESTBRAE
6 BIERGARTEN; and WESTBRAE PROPERTIES LLC (hereinafter collectively referred to as
7 “Defendants”), pursuant to Title III of the Americans with Disabilities Act of 1990 (42 U.S.C.
8 §§ 12101 et seq.) (“ADA”) and related California statutes.

II. JURISDICTION

10 3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for ADA
11 claims.

12 4. Supplemental jurisdiction for claims brought under parallel California law –
13 arising from the same nucleus of operative facts – is predicated on 28 U.S.C. § 1367.

14 ||| 5. Plaintiff's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

III. VENUE

16 6. All actions complained of herein take place within the jurisdiction of the United
17 States District Court, Northern District of California, and venue is invoked pursuant to 28
18 U.S.C. § 1331(b), (c).

IV. PARTIES

20 7. Defendants own, operate, and/or lease the Facility, and consist of a person (or
21 persons), firm, and/or corporation.

22 8. Plaintiff suffers from muscular dystrophy. As a result, he is substantially limited
23 in his ability to walk, has limited dexterity, and must use a wheelchair for mobility.
24 Consequently, Plaintiff is “physically disabled,” as defined by all applicable California and
25 United States laws, and a member of the public whose rights are protected by these laws.

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V. FACTS

9. The Facility is open to the public, intended for non-residential use, and its operation affects commerce. The Facility is therefore a public accommodation as defined by applicable state and federal laws.

10. Plaintiff lives less than fifteen miles from the Facility and visited the Facility on or about July 2, 2022 to have dinner with his wife. During his visit to the Facility, Plaintiff personally encountered barriers (both physical and intangible) that interfered with, if not outright denied, Plaintiff's ability to use and enjoy the goods, services, privileges and accommodations offered at the Facility. These barriers include, but are not necessarily limited to, the following:

- a) Plaintiff was not able to place his own food order because the sales and service counter was too high. Plaintiff's wife had to order and pay for Plaintiff's meal.
 - b) Plaintiff could only locate one dining table that provided sufficient knee and toe clearances for his wheelchair, and it was already occupied by a party of able-bodied patrons. Embarrassingly, Plaintiff had to ask them to move to a different table so that he could use the accessible table. Then, Plaintiff and his wife were uncomfortable throughout their meal as it was a bright and chilly day and the accessible table was located in an unenclosed and unshaded area, whereas many of the non-accessible tables were more protected from the elements. Although the partially enclosed and fully shaded "greenhouse" section appeared to have some potentially accessible tables, Plaintiff was not able to reach them as they were located on a surface of loose gravel.
 - c) After his meal, Plaintiff needed to use the restroom at the Facility. Along the walkway leading to the restroom, Plaintiff encountered a sudden excessive change in level which was alarming and physically jarring to wheel over.

d) Plaintiff was unable to reach the soap dispenser in the restroom as it was located in a corner, obstructed by the lavatory and the paper towel dispenser/trash can. His wife had to dispense the liquid soap onto her own hand and transfer it onto Plaintiff's, which was awkward and frustrating.

11. There may exist other barriers at the Facility which relate to Plaintiff's disabilities, and he will seek to amend this Complaint once such additional barriers are identified as it is Plaintiff's intention to have all barriers which exist at the Facility and relate to his disabilities removed to afford him full and equal access.

12. Plaintiff was, and continues to be, deterred from visiting the Facility because Plaintiff knows that the Facility's goods, services, facilities, privileges, advantages, and accommodations were and are unavailable to Plaintiff due to Plaintiff's physical disabilities. Plaintiff enjoys the goods and services offered at the Facility, and will return to the Facility once the barriers are removed.

13. Defendants knew, or should have known, that these elements and areas of the Facility were inaccessible, violate state and federal law, and interfere with (or deny) access to the physically disabled. Moreover, Defendants have the financial resources to remove these barriers from the Facility (without much difficulty or expense), and make the Facility accessible to the physically disabled. To date, however, Defendants refuse to either remove those barriers or seek an unreasonable hardship exemption to excuse non-compliance.

14. At all relevant times, Defendants have possessed and enjoyed sufficient control and authority to modify the Facility to remove impediments to wheelchair access and to comply with the 1991 ADA Accessibility Guidelines and/or the 2010 ADA Standards for Accessible Design. Defendants have not removed such impediments and have not modified the Facility to conform to accessibility standards. Defendants have intentionally maintained the Facility in its current condition and have intentionally refrained from altering the Facility so that it complies with the accessibility standards.

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1 15. Plaintiff further alleges that the (continued) presence of barriers at the Facility is
2 so obvious as to establish Defendants' discriminatory intent. On information and belief,
3 Plaintiff avers that evidence of this discriminatory intent includes Defendants' refusal to adhere
4 to relevant building standards; disregard for the building plans and permits issued for the
5 Facility; conscientious decision to maintain the architectural layout (as it currently exists) at the
6 Facility; decision not to remove barriers from the Facility; and allowance that Defendants'
7 property continues to exist in its non-compliant state. Plaintiff further alleges, on information
8 and belief, that the Facility is not in the midst of a remodel, and that the barriers present at the
9 Facility are not isolated or temporary interruptions in access due to maintenance or repairs.

VI. FIRST CLAIM

Americans with Disabilities Act of 1990

Denial of “Full and Equal” Enjoyment and Use

13 16. Plaintiff re-pleads and incorporates by reference the allegations contained in
14 each of the foregoing paragraphs, and incorporates them herein as if separately re-pled.

15 17. Title III of the ADA holds as a “general rule” that no individual shall be
16 discriminated against on the basis of disability in the full and equal enjoyment (or use) of
17 goods, services, facilities, privileges, and accommodations offered by any person who owns,
18 operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a).

18. Defendants discriminated against Plaintiff by denying Plaintiff "full and equal
enjoyment" and use of the goods, services, facilities, privileges and accommodations of the
Facility during each visit and each incident of deterrence.

Failure to Remove Architectural Barriers in an Existing Facility

19. The ADA specifically prohibits failing to remove architectural barriers, which
20 are structural in nature, in existing facilities where such removal is readily achievable. 42
21 U.S.C. § 12182(b)(2)(A)(iv).

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1 20. When an entity can demonstrate that removal of a barrier is not readily
2 achievable, a failure to make goods, services, facilities, or accommodations available through
3 alternative methods is also specifically prohibited if these methods are readily achievable. Id.
4 § 12182(b)(2)(A)(v).

5 21. Here, Plaintiff alleges that Defendants can easily remove the architectural
6 barriers at the Facility without much difficulty or expense, that the cost of removing the
7 architectural barriers does not exceed the benefits under the particular circumstances, and that
8 Defendants violated the ADA by failing to remove those barriers, when it was readily
9 achievable to do so.

10 22. In the alternative, if it was not “readily achievable” for Defendants to remove
11 the Facility’s barriers, then Defendants violated the ADA by failing to make the required
12 services available through alternative methods, which are readily achievable.

13 Failure to Design and Construct an Accessible Facility

14 23. Plaintiff alleges on information and belief that the Facility was designed and
15 constructed (or both) after January 26, 1993 – independently triggering access requirements
16 under Title III of the ADA.

17 24. The ADA also prohibits designing and constructing facilities for first occupancy
18 after January 26, 1993, that aren’t readily accessible to, and usable by, individuals with
19 disabilities when it was structurally practicable to do so. 42 U.S.C. § 12183(a)(1).

20 25. Here, Defendants violated the ADA by designing and constructing (or both) the
21 Facility in a manner that was not readily accessible to the physically disabled public –
22 including Plaintiff – when it was structurally practical to do so.¹

23 Failure to Make an Altered Facility Accessible

24 26. Plaintiff alleges on information and belief that the Facility was modified after
25 January 26, 1993, independently triggering access requirements under the ADA.

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28 ¹ Nothing within this Complaint should be construed as an allegation that Plaintiff is bringing this action as a
private attorney general under either state or federal statutes.

1 27. The ADA also requires that facilities altered in a manner that affects (or could
2 affect) its usability must be made readily accessible to individuals with disabilities to the
3 maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering an area that contains a facility's
4 primary function also requires making the paths of travel, bathrooms, telephones, and drinking
5 fountains serving that area accessible to the maximum extent feasible. *Id.*

6 28. Here, Defendants altered the Facility in a manner that violated the ADA and
7 was not readily accessible to the physically disabled public – including Plaintiff – to the
8 maximum extent feasible.

Failure to Modify Existing Policies and Procedures

10 29. The ADA also requires reasonable modifications in policies, practices, or
11 procedures, when necessary to afford such goods, services, facilities, or accommodations to
12 individuals with disabilities, unless the entity can demonstrate that making such modifications
13 would fundamentally alter their nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

14 30. Here, Defendants violated the ADA by failing to make reasonable modifications
15 in policies, practices, or procedures at the Facility, when these modifications were necessary to
16 afford (and would not fundamentally alter the nature of) these goods, services, facilities, or
17 accommodations.

Failure to Maintain Accessible Features

19 31. Defendants additionally violated the ADA by failing to maintain in operable
20 working condition those features of the Facility that are required to be readily accessible to and
21 usable by persons with disabilities.

22 32. Such failure by Defendants to maintain the Facility in an accessible condition
23 was not an isolated or temporary interruption in service or access due to maintenance or
24 repairs.

25 33. Plaintiff seeks all relief available under the ADA (i.e., injunctive relief, attorney
26 fees, costs, legal expense) for these aforementioned violations. 42 U.S.C. § 12205.

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VII. SECOND CLAIM

34. Plaintiff re-pleads and incorporates by reference the allegations contained in each of the foregoing paragraphs, and incorporates them herein as if separately re-pled.

35. California Civil Code § 51 states, in part, that: All persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

36. California Civil Code § 51.5 also states, in part that: No business establishment of any kind whatsoever shall discriminate against any person in this state because of the disability of the person.

37. California Civil Code § 51(f) specifically incorporates (by reference) an individual's rights under the ADA into the Unruh Act.

38. Defendants' aforementioned acts and omissions denied the physically disabled public – including Plaintiff – full and equal accommodations, advantages, facilities, privileges and services in a business establishment (because of their physical disability).

39. These acts and omissions (including the ones that violate the ADA) denied, aided or incited a denial, or discriminated against Plaintiff by violating the Unruh Act.

40. Plaintiff was damaged by Defendants' wrongful conduct, and seeks statutory minimum damages of \$4,000 for each offense.

41. Plaintiff also seeks to enjoin Defendants from violating the Unruh Act (and ADA), and recover reasonable attorneys' fees and costs incurred under California Civil Code § 52(a).

VIII. THIRD CLAIM

Denial of Full and Equal Access to Public Facilities

42. Plaintiff re-pleads and incorporates by reference the allegations contained in each of the foregoing paragraphs, and incorporates them herein as if separately re-pled.

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43. Health and Safety Code § 19955(a) states, in part, that: California public accommodations or facilities (built with private funds) shall adhere to the provisions of Government Code § 4450.

44. Health and Safety Code § 19959 states, in part, that: Every existing (non-exempt) public accommodation constructed prior to July 1, 1970, which is altered or structurally repaired, is required to comply with this chapter.

45. Plaintiff alleges the Facility is a public accommodation constructed, altered, or repaired in a manner that violates Part 5.5 of the Health and Safety Code or Government Code § 4450 (or both), and that the Facility was not exempt under Health and Safety Code § 19956.

46. Defendants' non-compliance with these requirements at the Facility aggrieved (or potentially aggrieved) Plaintiff and other persons with physical disabilities. Accordingly, Plaintiff seeks injunctive relief and attorney fees pursuant to Health and Safety Code § 19953.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, for:

1. Injunctive relief, preventive relief, or any other relief the Court deems proper.
 2. Statutory minimum damages under section 52(a) of the California Civil Code according to proof.
 3. Declaratory relief finding that Defendants violated the ADA.
 4. Attorneys' fees, litigation expenses, and costs of suit.²
 5. Interest at the legal rate from the date of the filing of this action.
 6. For such other and further relief as the Court deems proper.

Dated: 10/13/2022

MOORE LAW FIRM, P.C.

/s/ *Tanya E. Moore*

Tanya E. Moore

Attorney for Plaintiff

Albert Dvorchak

² This includes attorneys' fees under California Code of Civil Procedure § 1021.5.

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2 **VERIFICATION**
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5 I, ALBERT DYTCH, am the plaintiff in the above-entitled action. I have read the
6 foregoing Complaint and know the contents thereof. The same is true of my own knowledge,
7 except as to those matters which are therein alleged on information and belief, and as to those
8 matters, I believe them to be true.

9 I verify under penalty of perjury that the foregoing is true and correct.
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Dated: 10/13/2022

/s/ Albert Dytch
Albert Dytch

I attest that the original signature of the person whose electronic signature is shown above is
maintained by me, and that his concurrence in the filing of this document and attribution of his
signature was obtained.

/s/ Tanya E. Moore
Tanya E. Moore, Attorney for
Plaintiff, Albert Dytch